
(2003) 12 AP CK 0049

In the Andhra Pradesh High Court

Case No : Civil Miscellaneous Appeal No. 1242 of 1993

G. Md. Masoom

APPELLANT

Vs

S.K. Khader Vali and AnotherCase

RESPONDENT

Date of Decision : 30-12-2003

Acts Referred:

Evidence Act, 1872 — Section 114
Motor Vehicles (Amendment) Act, 1978 — Section 110(1)
Motor Vehicles Act, 1939 — Section 110
Motor Vehicles Act, 1988 — Section 10(A), 110(1), 110A(1), 110F, 165

Citation : (2004) 2 ACC 794 : (2005) ACJ 1802 : (2004) 2 ALD 324

Hon'ble Judges : S.R.K. Prasad, J;B. Prakash Rao, J

Bench : Division Bench

Advocate : K. Soma Konda Reddy, for the Appellant; Kota Subba Rao, Ravi Shankar Jandhyala and A. Veeraswamy, Spl. Govt. Pleader, for the Respondent

Judgement

S.R.K.P. J.

1. Originally, this Civil Miscellaneous Appeal was heard by a learned single Judge of this Court and he framed the following question:

"Whether the owner of a vehicle can make a claim not only for damages caused to his vehicle but also business loss which he insured consequent on the damage having been caused to his vehicle"

2. The matter was asked to be placed before a Division Bench. The matter is placed before this Bench. An accident occurred after commencement of the Motor Vehicles Act, 1988, hereinafter referred to as "the Act". The owner of the vehicle claimed business loss u/s 166 of the Act. This is challenged by the Insurance Company. This Court has to consider whether the business loss can be claimed by the owner before the Claims Tribunal. Special Government Pleader is appointed as amicus curai to assist the Court in this case apart from hearing on both sides.

3. The learned counsel for the claimant mainly contends that the owner of the vehicle is entitled to compensation before the Tribunal as the jurisdiction of the Civil Court has been ousted and he is entitled to claim business loss before the Tribunal.

4. The learned counsel appearing for the Insurance Company contends that the business loss is not incidental to the claim of damage caused to the property of the vehicle and hence business loss cannot be claimed before the Tribunal and the Civil Court alone has got jurisdiction.

5. The learned single Judge has referred to the decisions reported in *Manager, NIAC Ltd., v. M. Prasad Rao* 1997 (2) ALD 270 as well as *R.D. Hattangadi Vs. M/s. Pest Control (India) Pvt. Ltd. and Others*, . He has also referred to the decisions of Madhya Pradesh and Kerala High Courts reported in AIR 1985 MP 4 and 1983 ACJ 447 and the decisions of *Niranjan Lal Ram Chandra Vs. Ram Swarup Bhagwan Singh and Another*, and 1982 ACJ 159 (Mad). Thereafter, he referred the matter before this Bench, as there are conflicting decisions in respect of inclusion of business loss.

6. Before advertng to the same, it is necessary to have a look at the provisions of the Motor Vehicles Act, 1988. We intend to answer the point with reference to the provisions of the Act 1988 as the accident occurred on 2.12.1988 after the commencement of the Act 1988. Section 165 of the Act reads as follows:

"Claims Tribunals:- (1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this Chapter referred to as Claims Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both.

Explanation:- For the removal of doubts, it is hereby declared that the expression "claims for compensation in respect of accidents involving the death of or bodily injury to, persons arising out of the use of motor vehicles" includes claims for compensation u/s 140 [and Section 163A].

(2) A Claims Tribunal shall consist of such number of members as the State Government may think fit to appoint and where it consists of two or more members, one of them shall be appointed as the Chairman thereof.

(3) A person shall not be qualified for appointment as a member of a Claims Tribunal unless he,--

(a) is, or has been, a Judge of a High Court, or

(b) is, or has been a District Judge, or

(c) is qualified for appointment as a Judge High Court [or as a District Judge].

(4) Where two or more Claims Tribunals are constituted for any area, the State Government, may by general or special order, regulate the distribution of business among them."

The words u/s 163A in the explanation were added with effect from 14.11.1994 by Act 54 of 1994. Hence, there is no need to refer to the said amendment. Section 166 of the Act reads as under:

"Application for compensation:- (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 may be made, -

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorized by the person injured or all or any of the legal representatives of the deceased, as the case may be;

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

[(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed;

Provided that where no claim for compensation u/s 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.]

[x x x]

[(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act.]"

Sub-Section (3) was omitted with effect from 14.11.1994. The Motor Vehicles Act 1939 has been repealed. It has been amended by Amendment Act 47 of 1978 which came into force from 16.1.1979. Under the said Act, the owner of the property was allowed to claim compensation for damages to the property as can be seen from Section 110-A of the Act which reads as follows:

"Application for compensation: (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 110 may be made-

(a) by the person who has sustained the injury; or

[(aa) by the owner of the property; or]

(b) where death has resulted from the accident, [by all or any of the legal representatives] of the deceased; or

(c) by any agent duly authorized by the person injured [or all or any of the legal representatives] of the deceased, as the case may be;

[Provided that, where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined shall be impleaded as respondents to the application.]

(2) Every application under sub-section (1) shall be made to the Claims Tribunal having jurisdiction over the area in which the accident occurred, and shall be in such form and shall contain such particulars as may be prescribed.

[Provided that where any claim for compensation u/s 92A is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

(3) No application for [such compensation] shall be entertained unless it is made within [six months] of the occurrence of the accident;

Provided that the Claims Tribunal may entertain the application after the expiry of the said period of [six months] if it is satisfied that the applicant was prevented by sufficient cause from making the application in time]."

In 1988 a consolidated Act has been passed. Section 110-A corresponds to Section 166 of the new Act. It is clear from the aforesaid provisions that the owner of the property or of the vehicle involved in the accident can claim compensation by presenting an application. Section 168 of the Act empowers the Claims Tribunal to pass an award. Section 165 contemplates constitution of Claims Tribunal by the State Government by means of notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both. Section 175 of the Act reads as under:

"Bar on jurisdiction of Civil Courts:- Where any Claims Tribunal has been constituted for any area, no Civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, and no injunction in respect of any action

taken or to be taken by or before the Claims Tribunal in respect of the claim for compensation shall be granted by the Civil Court."

Section 175 of the Act ousted the jurisdiction of the Civil Courts in respect of claim for compensation, which has to be made before the Claims Tribunal, which has been constituted in an area. Hence, it is clear whenever damage is caused to any property of a third party, the owner of the vehicle of the property can claim compensation before the Claims Tribunal and the Civil Court has no jurisdiction. The words mentioned in the said provision are express and explicit. The application for compensation by the owner of the vehicle of the property has to be made u/s 166 of the Act. The question that has to be considered is whether any loss occasioned due to the involvement of the vehicle in an accident sustaining damage has to be claimed before the Claims Tribunal or the Civil Court. It all depends upon the interpretation that has to be put on to any property of a third party so arises. A catena of decisions has been referred to by the learned counsel for the claimant as well as the learned counsel for the respondents and the learned Special Government Pleader appointed as *amicus curiae*.

7. Before advertng to the said decisions, it is necessary to judge as to how the damage to a property has to be arrived at by having a resort to English decisions. Damage has been defined in *Amiya Kumar v. Krishna Singh*³ as under:

"Damages means the harm or loss suffered or presumed to be suffered by a person as a result of the money given to compensate the damage is called "damages"."

It is stated in a case reported in *Admiralty Commissioner v. S.S.Suaquehanna* (1926) A.C. 655 at 661 that in cases of collision of ships the actual loss suffered by being deprived of the use of the vessel during the period of repairs has to be included while arriving at the damages. The relevant portion is found at C.Kameswara Rao's *Law of Damages and Compensation*, Fifth Edition, Volume 3 at page 2213 as under:

"As a broad principle it may be stated that whenever a chattel is damaged by a wrongful act of another, the deprivation of its use to the owner is a direct consequence for which the owner is entitled to recover. The question in all these cases is, what is the use which, but for the wrong the owner would have made of the vessel, and in considering this, all speculative and hypothetical matters will have to be eliminated. Thus, it has been laid down that the basis of the assessment of damages, in cases of collision, is only the actual loss suffered by being deprived of the use of the vessel during the period of repairs and not such as can only be called hypothetical."

It is also found at page 2211 of the said volume that in every collision case, whether it occurs on land or at sea, the tests to be applied for ascertaining the cause of the accident are the same, and there is no justification for saying that the rules of the Court of Admiralty and the rules of a Court of Law as to what

amounts to a fault occasioning an accident differ in the slightest degree. The same has been laid down in the decision reported in *The Chekiang* (1925) 94 L.J.P.D. & A. 51 and also *Admiralty Commissioners v. S.S.Suaquehanna* (supra). The measure of damages is said to be based upon the principle of *restitutio in integrum*. Whenever there is partial loss of a ship the damages may be in relation to (1) the immediate expenses occasioned by the collision, (2) repairs, and (3) detention of the ship. The basic principles that led to conferring right to claim damages by way of compensation by the owner of the property u/s 110A by inserting under Act 47 of 1978 which came into force on 16.1.1979. It has to be considered to what extent the owner of the property can claim damages. There cannot be any dispute that the owner of the property is entitled to claim damages for the damage caused to the vehicle. The Legislature in its wisdom has incorporated the damages that can be claimed under Second Schedule, thereby it has given recognition to the principles laid down under various ratio decidendi as can be seen from the following three general damages: (1) in cases of death, (2) in cases of injuries and disability, and (3) disability in non-fatal accidents. Option is given to the claimant either to claim compensation u/s 163A of the Act on structural formula basis or under other Sections. Hence, statutory recognition has been given by incorporating some of the principles laid down in the decisions of the Supreme Court that are being followed earlier. But the Supreme Court has given guidelines in *R.D.Hattangadi v. M/s.Pest Control (India) Pvt. Ltd.*, (supra 2) for calculation of damages as under:

"Broadly speaking while fixing an amount of compensation payable to a victim of an accident the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated."

Some of the principles have been incorporated in the Schedule classifying the nature of claims that can be made. The Legislature mentioned as "damages" without classifying as pecuniary and non-pecuniary damages. It is stated in *The Oriental Insurance Co. Ltd. etc. Vs. Hansrajbhai V.Kodala and Others etc. etc.*, that the right to get compensation u/s 163A is additional to the claim of compensation based on no fault liability. That shows the Legislature has recognized almost the method of calculation in awarding compensation under various heads. But it has not given the method of calculation in respect of damage to a property, which has to be claimed by the owner that can be granted by the court. In view of the same it is always left open for the courts to evolve a method for giving compensation for the damage caused.

8. The learned counsel appearing for the claimant contends that he is entitled to business loss since it amounts to loss of income due to the accident and deprivation of the usage of the vehicle. The instance quoted by him is the compensation granted for the loss of income in respect of person sustaining injuries.

9. We now proceed to deal with the catena of decisions placed before this Court.

The earliest decision reported in is The Deputy General Manager and Divi. Controller, Karnataka State Road Transport Corporation, Hubli Vs. Jyoti Constructions, Mangalore and Another, Mangalore, The relevant portion at paras 7, 8, 9, 10, 12, 15 and 18 as under:

"7. The learned counsel appearing for the respondents pointed out that even after amending S.110(1), the Legislature has not thought it proper to amend Section 110-A (1) enabling an additional category of persons who have suffered damages to property to prefer an application. That way he submitted that, reading of the two sections together, the Court should come to the conclusion that persons who suffered merely damages to property are not entitled to apply to the Claims Tribunal for compensation. According to him, at best, only those persons who have suffered composite injuries, both to body and property or death or damages to property could apply to the Tribunal.

8. As against the aforesaid submission, the learned advocate appearing on behalf of the appellant vehemently contended that Cl. (a) of sub-sec.(1) of Sec.110A of the Act provides that the person who has suffered damages to property also could apply. The said clause reads thus:

"(a) by the person who has sustained the injury".

He, in this connection, submitted that the term "injury" is wide enough to cover damages to property also, and as such, the Legislature, perhaps, thought it unnecessary to further amend that section.

9. The term "injury" is defined in Stroud's Judicial Dictionary, Fourth Edition, at page 1372, inter alia, thus:

"Injury (1) "injury", "injuria", (1) A wrong or damage to a man's person or goods."

Thus, the very first definition given therein shows that "injury" includes, a wrong or damage to a man's person or goods.

10. The word "sustain" is defined in Webster's Dictionary, Third Edition, Vol.III thus:

"Sustain", to give support to, to supply, to provide for the support, to cause to continue, to allow, to play, to bear up, to endure etc."

It therefore becomes clear that even the word "sustain" has wide amplitude of meanings. Even to endure damages or to suffer damages, is included in the word "sustain". It is obvious that there was, therefore, no necessity for the Legislature to correspondingly amend Section 110-A(1) of the Act, creating a forth category of petitioners covering persons who have suffered damages to property. Cl.(a) of sub-sec.(1) of section 110-A of the Act, as pointed out above, in the words "a person who has sustained injury" also covers the person who has suffered damages, besides personal bodily injury.

12. The Supreme Court has made similar observations in *Sheikh Gulfan and Others Vs. Sanat Kumar Ganguli*, of the Judgment, His Lordship, Chief Justice, Gajendragadkar (as he then was), has observed thus:

"..... Normally, the words used in a statute have to be construed in their ordinary meaning; but in many cases, judicial approach finds that the simple device of adopting the ordinary meaning of words does not meet the ends of a fair and reasonable construction. Exclusive reliance on the bare dictionary meaning of words may not necessarily assist a proper construction of the statutory provision in which the words occur. Often enough, in interpreting a statutory provision, it becomes necessary to have regard to the subject matter of the statute and the object which it is intended to achieve. That is why in deciding the true scope and effect of the relevant word in any statutory provision, the context in which the words occur, the object of the statute in which the provision is included, and the policy underlying the statute assume relevance and become material. As Halsbury has observed, the words "should be construed in the light of their context rather than what may be either their strict etymological sense or their popular meaning apart from that context."

15. It is in this light that we have to examine S.110(1) and S.110-A (1) of the Act. Before the amending Act 56 of 1969, the High Courts in India rendered conflicting decisions on whether the Claims tribunal could entertain a claim for damages to property. Some of the High Courts held that the Claims tribunal could entertain such petitions, if they formed part of a composite claim, viz., along with bodily injury or death. The other High Courts held that even so, the claim could not be entertained. It is to remedy this state of affairs that the Legislature has stepped in and has amended, in unmistakable terms, S.110(1) of the Act, enabling the Claims Tribunal to entertain petitions even with regard to damages to property alone. The aim and purpose of Ss.110 and 110-A to 110-F are to provide to the victims of the accident cheap and speedy remedy. Keeping in view the purpose of the Act, and the purpose for which S.110(1) was amended, it is obvious that it is necessary to give a wider interpretation to the words "sustain" and "injury" occurring in S.110-A (1)(a) of the Act, as covering damages to property also.

18. On the other hand, in the aforesaid case (AIR 1978 Punj & Har 171), their Lordships have taken the view that Claims Tribunal is entitled to entertain a petition, merely claiming damages to property under S.110-A(1) (a) of the Act. Similar are the views taken by the High Court of Madhya Pradesh in the cases of *Banwari Lal v. Vishnunarayana* 1975 Acc CJ 40 and *Shyambihari v. Shiv Singh* 1976 Acc CJ 95. That being so, we have no hesitation to hold that the Claims tribunal, as discussed above, is competent to entertain a petition merely for damages to property without anything more u/s 110(1) read with S.110-A(1)(a) of the Act. The order passed by the Tribunal, per contra, is hereby set aside."

It is clear from the principles laid down in the above decision that damages to the property can be claimed. It is held by the Punjab and Haryana High Court in

Haryana State v. Pusa Ram and others 1979 A.C.J 12 held that the Claims Tribunal has got jurisdiction to award compensation for damage to the property because the person whose property has been damaged in an accident would be the person who has sustained the injury within the meaning of Section 110-A(1) (a) of the Act. In Sri Ranganathar Transports (P) Ltd., v. The Tanjore Co-operative Marketing Federation Ltd., 1982 A.C.J. 199 it is observed that the suit for recovery of damages to the lorry and compensation for loss of earning by reason or lorry being kept idle during repair is maintainable before the Tribunal. Section 110-F of the Act bars the jurisdiction of Civil Court. In Sunil Kumar Ghosh vs. Union of India⁹ it is observed at paras 7 and 8 as under:

"7. Section 82-A creates a statutory liability of the railway administration in case of death of a passenger or personal injury to him, as a result of an accident occurring in the course of working a railway. The accident may be a collision between train of which one is a passenger between train of which one is a passenger train or derailment or accident to a train or any part thereof carrying passengers. The meaning of the word "accident" used in Section 82-A is of real significance. The context in which the word is used and the object of enacting this provision is to be kept in view in construing the meaning of the word "accident". The object of Section 82-A clearly is to provide that railway administration shall be liable to pay compensation for loss occasioned by death of or personal injury to a passenger and also for loss, destruction or deterioration of animals or goods of the passenger caused due to an "accident in course of working a railway" irrespective of the question of liability under the general law which depends on negligence. In other words, and briefly stated, Section 82-A applies when a passenger traveling by a train meets with an accident in the course of working a railway resulting in his death or personal injury without any reference to the question of negligence. The death of a passenger or personal injury to him during the course of his rail journey gives rise to the liability of the railway administration for payment of compensation in the manner prescribed by the Railway Accidents Compensation Rules, 1950 and the Schedule appended to it.

8. The word "accident", according to its ordinary meaning, which must be given to it and construed in the context in which it is used in section 82-A must mean to include within its ambit all incidents resulting in the death of or bodily injury to any passenger during his rail journey, occurring in the course of working a railway, if it involves a passenger train or a part thereof. Any incident treated as a railway accident involving a passenger train by the public at large and the railway staff should be treated to be such an accident, falling within the ambit of Section 82-A. Any mishap or misfortune in the working of a railway involving a passenger train or a part thereof resulting in the death of/or personal injury to a passenger traveling therein, during his rail journey is an accident within the ambit of section 82-A. This will, of course, exclude any incident voluntarily and consciously invited by the passenger, e.g., suicide by jumping in front of the moving train. We have, therefore, to see whether to the facts of this case,

section 82-A applies."

It was a case dealt with under the Railways Act, 1890 and Railway Accident Compensation Rules 1950. It is stated in *New India Assurance Company Ltd., v. Gauri Shanker Sharma*, at paras 10, 12 and 14 as under:

"10. However, all this goes to show that the damage to property in an accident by a motor vehicle is covered by the jurisdiction of the Accidents Claims Tribunal and no valid objection can be taken to entertainment of such a claim, all alone, even though it may not be a composite claim.

12. Here again, I am in agreement with Mr.Mathur that, as held by the Bombay High Court in *Sharada Prasad Singh v. Maharashtra State Road Trans. Copn.*, 1984 ACJ 240 (Bombay), the liability of the insurance company would be according to the risk covered in the policy and it cannot be restricted to the statutory limit enshrined in sections 95(2) and 96(2) of the Act. In substance, it has been held that the contractual liability, if more than statutory limits, would prevail and, the statutory liability is only supplementary and would not, in any way, curtail the contractual liability.

14. In my considered opinion, any of provisions of sections 95 and 96 of the Act, no where curtails the liability of the insurance company but provides the requirement of the minimum liability or normal liability which should be covered by the insurance policy. In substance, there is no limit or ceiling of the liability."

It has interpreted Sections 110(1) and 110-A (1)(aa) and held that the Claims Tribunal has got jurisdiction. It is stated in *Central Road Transport Corporation Ltd., v. Orissa State Commercial Transport Corporation*¹¹ that the Claims Tribunal has got jurisdiction to entertain the application for damage to property also. It has considered a case arising out of sub-section (1) of Section 110 prior to its amendment by Act 47 of 1978 and observed that the Civil Court has got jurisdiction only when the matter is referred to it through Claims Tribunal. It has no application after the amendment by Act 47 of 1978. That has not of much relevance to the facts of this case. It is stated in *Kamal Kusha v. Kirpal Singh and others* 1987 A.C.J. 709 that u/s 110(1) and 110-A [as amended by Act No.56 of 1969] the Claims Tribunal has got jurisdiction to grant damages to the property. It is also stated in *Assam State Transport Corporation v. Kamurun Nessa Mazumdar and others*¹³ by the Gauhati High Court that compensation can be awarded for damages to the property and it disallowed the claim on account of loss of income. In *Kerala State Road Transport Corporation Vs. Bhaskaran and Others*, it is stated that the Claims Tribunal has got jurisdiction to entertain a claim for loss of revenue on account of deprivation of use of the vehicle. It is held as paras 7 and 8 as under:

"7. The learned counsel for the appellant nonetheless argued that the words employed in Section 110 of 1939 Act corresponding to section 165 of 1988 Act, namely, "damages to any property" in fact empowers the Claims Tribunal to award compensation for the deprivation of the use of the vehicle during the

period when it was under repair. In support of this contention the counsel relied on a recent decision of the Karnataka High Court in Karnataka State Road Transport Corporation Vs. Abdul Majeed, . The Division Bench considering a similar argument has held that it is a settled position in law that the concept of damage to property includes compensation for loss of use or loss of income directly resulting from damage. The Division Bench has further held that by amending section 110 of the Act, the legislature intended to give relief to persons who had suffered loss as a result of damage to their property as a result of a motor accident and in the absence of any express or implied indication to the contrary, the expression "damages to property" must be given the same meaning which it has been assigned in the law of damages which takes in not merely actual damage to the property but also loss on account of non-availability for use. The Division Bench accordingly was of the view that the legislature did not intend to restrict the meaning of these words as to say that the Claims Tribunal can award compensation only for actual damage to the property and not to loss of income arising directly therefrom. Had that been the intention, it is further observed, the legislature would have so expressed.

8. This ruling of the Karnataka High Court, which runs counter to the dictum laid down by this court, undoubtedly supports the above argument of the learned counsel."

It is clear from the principles laid down in the said decision that the Kerala High Court did not agree with the dictum laid down by the Karnataka High Court that the Claims Tribunal can award compensation only for actual damages and not loss to income. It has further observed at para 9 as under:

"..... We, therefore, are inclined to take the view that by enacting section 110 the Parliament never intended to confer jurisdiction on the Claims Tribunal to determine the damages falling under the head "consequential pecuniary losses" suffered by a person in relation to torts concerning property. We accordingly conclude that the Claims Tribunal has jurisdiction, apart from its power to adjudicate upon claims for compensation in respect of death or personal injury to persons, to adjudicate upon claims for compensation in respect of basic pecuniary losses in relation to torts concerning property also. The Claims Tribunal, therefore, cannot be said to have jurisdiction to adjudicate upon the claims falling under the head "consequential pecuniary losses" in relation to torts concerning property."

The Division Bench of this Court in Andhra Pradesh State Road Transport Corporation Vs. K. Chandra Reddy alias K. Chandrasekhara Reddy and Another, has considered the amendments made by Act Nos.56 of 1969 and 47 of 1978 and stated that claims has to be made first before Claims Tribunal irrespective of the amount of damages claimed and the claimant may seek reference to Civil Court in case claim exceeds Rs.2000/-. It was dealing with a provision which has been deleted by way of Amendment Act 47 of 1978. In view of deleting the same and incorporating Section 165 of the Act 1988, the Claims Tribunal alone has to

decide regarding compensation to be awarded in relation to damage to the property. In *Manager, New India Assurance Co.Ltd., v. Morampudi Prasada Rao*¹⁶ a single Judge of this Court has considered the entire law and categorically stated that the loss of earnings or loss of business or loss of profit can be awarded by the Tribunal and there is no need to drive them to the Civil Court. The relevant portion at paras 4 and 8 read as under:

"4. In *United India Fire and General Insurance Co., Ltd., Guntur*'s case (1985 (1) ALT 33 (NRC) this Court rationated the rests in support of such a view in meticulous terms as hereunder.

"In measuring damages there is no distinction between tort and contract. The general principle is restitution in integrum. It determining the sum of money as reparation for breach of contract as damages, as nearly as possible, get at that sum of money which will place the party injured in the same position as he would have been as if the contract has been performed or in the case of tort as if he had not sustained the wrong for which the compensation is being paid for. Appreciation of value tot eh motor vehicle or greater benefit or advantage due to repair or replacement of part or parts or accessories is only incidental to restitution and an inevitable and inseparable consequence. It is for the plaintiff to establish the factum of actual loss or damage suffered or the amount required or spent for replacement of part, or parts or accessories and reasonable repairing and fitting charges. The liability to indemnify the insured is limited to the contract. In no case it shall exceed the actual loss or damage or charges incurred subject to the maximum liability under the contract whichever is less. 1/3rd is to be deducted from the value of the replaced new parts or accessories."

These reasons can be supplemented with something more. Damage to a property involves the depreciation in value. In India, the replacement of such a damaged property is not always possible nor being done. Reparation has been the habit and the practice. In such a situation, the reparation will only supplement the damage and the person suffering loss of the value of such a damage has to be reimbursed to the extent of loss or damage and nothing more than that. It cannot be lost sight of that when a part of the property or machinery or the vehicle is damaged, for so many reasons, other parts may also be damaged or lost warranting the repair or the replacement. A part of the property may be diminished in quality or the value by constant use or misuse. Replacement of such parts of the damaged property will always enure to the benefit of the owner or the possessor. Therefore, in the guise of the repair if replacement is made, the Courts will be reimbursing to the owner something more than the actual loss and that is what is highlighted by this Court in the precedents *supra*. It cannot be forgotten that in many cases under the guise of the repairs possibly several of the parts may be replaced to make it a brand new property and this need not be deliberate but an opportunity to make the property a new one. Therefore, deduction of at least 1/3rd in such replacement of parts due to the damages during repairs is very much reasonable. However, it must be hastened to add

that deduction of 1/3rd or any portion may not be constant or permanent. It depends upon the facts and circumstances of each case. For example, in a given case, if the damage or loss to a particular proportion the deduction of the replacement, either be refused or increased. However, in the absence of any facts and circumstances leading to a clear guideline, in the normal cases, the deduction of 1/3rd should be taken as proper and reasonable. In this case, no such deduction has been made and that requires to be done. From the evidence in the case and in particular Ex.B-10 in item No.3 extra fittings are separately classified to be valued at Rs.15,240/-. Out of that, 1/3rd of the value would be Rs.5,080/-. Deducting that amount, the claimants ought to have been awarded Rs.10,160/- under item No.3 for extra fittings and not the full amount. In other words, out of the total amount of compensation of Rs.65,000/- by deducting Rs.5,080/- the remaining portion of the award i.e., Rs.59,920/- should be retained and confirmed.

8. Mr.Subba Rao has contended that in view of section 95(2)(d) of the Act, the limit of liability of the insurer in this case should be restricted to Rs.6,000/-. Mr.Rajasekhar on the contrary contends that as the insurer has not produced the insurance policy, no such restriction of liability can be placed. This Court is in full agreement with the latter contention. The result of the matter will depend upon the burden of proof. When the Supreme Court time and again cautioned the Insurance Company to produce the policy, so that the contents can be known to enforce and the liability, it meant that the burden of proving the contents of the insurance policy is on the insurer or to expose itself to the adverse inference that the production of such a policy would expose the truth that there may be a clause in the insurance policy which may stipulate the liability beyond the statutory liability. An illustration may be useful in this regard. If the contract of insurance policy between the insured and the insurer stipulates the condition that the limit of liability of the insurer is more than the statutory liability, it is the production of the insurance policy and proof which either proves or disproves the same. Normally, it is the person in possession of such a policy who should produce it to dispel such a doubt and the insurer who is a person to issue an insurance policy is bound to produce it who should have the special means of knowledge and custody of such a material. The failure of production of the same would mean that the production would expose them to the truth that there may be some stipulation which either reads down any statutory implication or that it de hors the statutory limitations. So far, that task is concerned, the claimant has no control over the same as it should be either the insurer or the insured who should do it. Particularly in a case like this where there is no dispute that the vehicle involved in the accident was insured with the appellant before us, two inferences are possible, viz., that either there was a stipulation in the policy which prescribe the limitation of the liability of the insurer something different from the statutory limitation u/s 95(2)(d) of the Act or that definitely it was something more than that and ultimately, the production of the same would have shown the truth and therefore it is not produced. Even the negligence of the

insurer is not placing the material before the Court, exposes to the adverse inference u/s 114 of the Indian Evidence Act also whether it is within the statute or out of the spirit of the statute. Therefore, in this case, the limit of liability cannot be Rs.6000/- and it should be to the entire extent of the amount awardable under the award."

It is observed by the Madras High Court in *Rajendran and Another Vs. Selvaraj and Others*, that the Claims Tribunal can entertain the damages to the property including loss of business income after considering the entire law.

10. In all the aforesaid decisions, it is clearly stated that the owner is entitled to claim damages for the vehicle involved in the accident. The Civil Court has no jurisdiction to award compensation after the amended provisions of Sections 165 and 166 of the Act which have come into force after the motor vehicle accident of 1988 as there is express bar of entertaining by civil court and the civil court cannot entertain a claim in respect of damage caused to the vehicle involved in the accident. The owner has been conferred with a right of presenting an application for compensation u/s 166 of the Act in respect of damages. The only thing that has to be decided is whether computation can be made in respect of business loss, which is part of the policy of insurance and whether the Tribunal has got jurisdiction under the head - Damages of compensation. It is clear from the principles laid down by the decisions rendered by the English Courts that the loss occasioned due to non-availability of the vehicle under repair can be awarded during the period of repair. It is not stated in those decisions that the entire business loss of income can be entertained or awarded. What is contemplated under the law is that the loss of income sustained during the period of vehicle under repair is an incidental loss, which resulted due to the damages to the vehicle, and it can be awarded and the Tribunal alone can entertain such a thing. Section 166 mentioned about the application to be made for compensation. Section 165 says that compensation can be claimed for damages to any property of a third party so arising out of the use of motor vehicle. Does it cover the loss of incidental income of the owner? It must be held that loss of incidental income due to non-availability of vehicle, which is under repairs, is covered. That has to be taken into consideration while awarding compensation. It cannot be stated that the incidental loss sustained by the owner due to the damage to the vehicle and due to non-availability of the vehicle cannot be taken into consideration. The Court has to take into consideration about the ousting of Civil Court's jurisdiction for claiming compensation in respect of damages to any property. The incidental loss of income has to be taken into consideration while awarding compensation for damages to the property. The single Judge of this Court has rightly observed that there cannot be two forums for claiming compensation. The incidental loss of income is part of the damages to be awarded by way of compensation. The same view has been taken by the English Courts. The method that has to be adopted is to calculate the loss of income due to non-availability of the vehicle. If the vehicle is insured with the Insurance Company, it is liable to pay damages which inclusive of

incidental loss of income due to non-availability of the vehicle. The incidental loss of income differs from business loss. The business loss has to be arrived at after taking into consideration of the non-availability of the vehicle on the particular period and its availability after repairs. We are of considered view that just compensation has to be arrived at by calculating the compensation towards damages including the incidental loss occasioned during the period of non-availability of the vehicle. On a consideration of the entire law, we are of the view that the owner of the vehicle is entitled to claim incidental loss of income under the head Damages caused to the vehicle before the Tribunal and the civil court has no jurisdiction. We also state that the Insurance Company is liable to pay compensation towards damages caused to the vehicle, which includes the incidental loss of income being part of business loss.

11. We answer the reference accordingly and direct the Registry to place the matter once again before the concerned single Judge for disposal of the appeal on merits.